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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION

Petitioners, the Honorable Bernard M. Decker, United States District Judge, and the treble-damage plaintiffs, respectfully request this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit, entered on February 4, 1970.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court have not yet been reported. They are respectively printed as Appendices A and B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

QUESTIONS PRESENTED

1. Whether a writ of mandamus can properly be used, despite the "final judgment" rule and 28 U.S.C. § 1292(b), to reverse a trial court's discovery order for the production of statements made by grand jury witnesses to defendants' counsel describing the witnesses' testimony before the grand jury?

2. Whether the Court of Appeals for the Seventh Circuit erred in holding, contrary to the ruling of the Tenth Circuit, that the corporation's attorney-client privilege extends to narrative statements solicited by corporate counsel from non-management employees about their grand jury testimony?

STATEMENT OF THE CASE

This petition arises out of pre-trial discovery proceedings in multi-district antitrust litigation consolidated before Judge Bernard M. Decker, United States District Court for the Northern District of Illinois. The representative plaintiffs instituted class actions to recover damages on behalf of public schools, public libraries, and parochial schools that were victims of a conspiracy by

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[1] On February 11, 1970, the Court of Appeals "Ordered that the issuance of the writ of mandamus be stayed for a period of thirty (30) days from this date, pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, pending application of respondents to the Supreme Court of the United States for a writ of certiorari and until final disposition thereof."

defendant publishers and wholesalers to inflate the prices of library editions of children's books.[2]

For more than a year and a half, plaintiffs have actively pursued discovery, including taking depositions of approximately one hundred witnesses. Faced with a pattern of forgetfulness, recalcitrance, prevarication and evasiveness by the witnesses, plaintiffs moved under Rule 34 for the production of so-called "debriefing" statements, *i.e.*, narrative accounts taken from employees and ex-employees of defendant companies which related to their testimony before a grand jury investigating price-fixing conspiracies in the sale of children's books to public schools and libraries.

Certain defendants opposed such production, interposing the attorney-client privilege and work-product doctrine.[3] Consequently, Judge Decker ordered that all relevant documents be produced, and provided:

> "that if any defendant objects to the production of any document . . . on the grounds of 'attorney-client' or 'work product' privilege, such defendant . . . shall file said document in a sealed envelope, accompanied by a precise factual statement setting forth the circumstances under which the document was prepared." (Order of August 7, 1969)

Upon consideration of the affidavits, briefs, arguments of counsel, as well as a review of deposition testimony and an *in camera* inspection of grand jury testimony,

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[2] The plaintiffs in the treble-damage proceedings here involved, are the States of Illinois, Indiana, Texas, West Virginia, Ohio, Wisconsin, Kansas and Minnesota, the City of Chicago, the Archbishop of Cincinnati, the Metropolitan Government of Nashville and Davidson County, and certain school districts in Nassau and Suffolk Counties, New York.

[3] Counsel for several defendants turned over such "debriefing" statements voluntarily.

Judge Decker found that the attorneys "did not render personal legal advice after the witnesses completed their grand jury testimony," and that "the debriefing consultations were apparently conducted as a favor to the corporations." (Appendix B, pp. 16a, 17a) Moreover, Judge Decker made the following findings:

> (a) "Each witness demonstrated a remarkable lack of memory concerning crucial evidence in controversy" and "what recollection they could muster was often so vague as to be of only limited value." (Appendix B, pp. 10a, 14a)
>
> (b) "Some witnesses have been deliberately evasive," "other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence," and the "deposition testimony sometimes conflicts with documentary evidence which the witnesses personally prepared several years ago." (Appendix B, pp. 8a, 14a)
>
> (c) The recall of each witness was substantially more extensive when he appeared before the grand jury, and "in each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect." (Appendix B, p. 10a)

In this context, the District Court enumerated several factors justifying release of the debriefing statements to aid plaintiffs in their search for truth:

> "The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten

the details of their operations; frequently, they cannot even remember major incidents in which deviations from 'net' prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances." (Appendix B, p. 21a)

On the record made by defendants, Judge Decker concluded that three "debriefing" statements were privileged and would be returned to counsel. With respect to thirty (30) "debriefing" statements, however, Judge Decker determined that (a) the evidence failed to establish that a confidential attorney-client relationship existed, and (b) plaintiffs had shown "good cause" and "special circumstances" for discovery which outweighed the qualified protection afforded work product, even assuming that simple witness narratives could be called work product. Judge Decker held that the corporate attorney-client privilege attaches when a responsible member of the corporate management seeks or receives legal advice on behalf of the corporation. In this regard, Judge Decker found that only two witnesses "were in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases.

Accordingly, the debriefing documents [with two exceptions] are not protected by a corporate attorney-client privilege." (Appendix B, p. 18a)

The defendants sought to have the matter certified for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court, following the holding in *Atlantic City Electric Co.* v. *General Electric Co.*, 337 F.2d 844 (2d Cir. 1964), denied certification on the ground that such a piecemeal appeal would not facilitate the final disposition of the case. (Transcript of Proceedings, October 17, 1969, pp. 39-40)

Upon a petition by defendants, the Court of Appeals granted in part and denied in part a writ of mandamus. The Court of Appeals refused to disturb the District Court's findings that no personal attorney-client privilege existed and that "good cause" had been shown for discovery of the work product of defense attorneys. With respect to the issue of corporate attorney-client privilege, the Seventh Circuit acknowledged that Judge Decker had properly applied the law enunciated in previous federal decisions:

> "The district judge substantially followed the 'control group' test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962), 210 FSupp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.
>
> * * *
>
> Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th

Cir., 1969), 392 F2d 686, 692; *Garrison* v. *General Motors Corp.* (S.D. Cal., 1963), 213 FSupp. 515." Appendix A, pp. 4a, 5a)

The opinion further conceded:

> "If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it." (Appendix A, p. 4a)

However, noting that the "control group" test has been criticized in four bar journal articles[1] the Seventh Circuit concluded that "the control group test is not wholly adequate" and that:

> "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (Appendix A, p. 5a)

For these two reasons alone, without any further effort to justify the use of mandamus, the Seventh Circuit ruled that Judge Decker's "order is unlawful" and that "a writ of mandamus will issue compelling respondent district judge to exempt from" his discovery order certain enumerated debriefing statements and "to order the return of each of those debriefing statements to the defendant which produced it."

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[1] Two of the articles cited were written by Bryson Burnham and Erwin Heininger, partners in Mayer, Friedlich, Spiess, Tierney, Brown & Platt, a firm which represents several defendants in this case and which took the lead in seeking mandamus. On the other hand, the Seventh Circuit ignored law review comments which favored application of the control group test. *E.g.*, Gardner, *Agency Problems in the Law of Attorney-Client Privilege*, 42 U. Det. L. J. 105, 117-119 (1964); 8 *Villanova L. Rev.* 423, 426 (1963); 15 *South Carolina L. Rev.* 574, 578 (1963).

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S ACTION IN GRANTING MANDAMUS CONTRAVENES THE DECISIONS OF THIS COURT AND CONFLICTS WITH A DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

The circumstances of this case provide no justification for the issuance of a writ of mandamus by the Seventh Circuit. Judge Decker had unquestioned power to order production of the "debriefing" statements under Rule 34 of the Federal Rules of Civil Procedure. The discovery order rested upon legal principles that had been developed in a number of federal and state decisions. Indeed, the Seventh Circuit concluded that Judge Decker properly applied the law embodied in several relevant federal decisions at the trial and appellate level.[5]

Moreover, precedent in addition to the cases cited by the Seventh Circuit supports Judge Decker's discovery order. *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D.N.Y., Dec. 4, 1962) (Ryan, Christensen, J.J.); *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E. 2d 802, 806 (1964). The Seventh Circuit itself has previously indicated acceptance of a standard similar to the "control group" test in *Rucker* v. *Wabash Railroad Co.*, 418 F.2d 146, 154 (7th Cir. 1969):

> "Neither party may successfully assert the attorney-client privilege as to the statements of non-party witnesses. Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451. This is true of defendant's statements given by its servants and agents in this case. None were of such rank as to qualify as representative of the corporate client."

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[5] *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1968); *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F.Supp. 483 (E.D. Pa. 1962); *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Calif. 1963).

The admission that Judge Decker "substantially followed" all relevant case law vitiates any justification to review his determination by the extraordinary remedy of mandamus.

On numerous occasions the Court has stressed that "only exceptional circumstances amounting to a judicial usurpation of power will justify invocation" of the extraordinary remedy of mandamus to overturn a district court discovery ruling. *Will* v. *United States*, 389 U.S. 90, 95 (1967). The *Will* opinion goes on to state:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" (389 U.S. at 98, n. 6)

This rule and policy against employment of mandamus to review an allegedly erroneous ruling within the jurisdiction of the district court applies with equal force in civil litigation and criminal cases. In *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), a civil antitrust case, this Court reversed a grant of mandamus, holding as follows:

> "The ruling on the question of law decisive of the issue . . . was made in the course of the exercise of the court's discretion to decide issues properly brought before it. . . . Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power [cite] and is reviewable upon appeal after final judgment. . . . Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts

> by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . . ." (346 U.S. at 382-383)

The writ of mandamus cannot be used when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States*, 351 U.S. 513, 520 (1956). As more fully stated by the Court of Appeals for the Fifth Circuit:

> "[M]andamus or prohibition is singularly inappropriate to determine the correctness of a controlling decision of law 'as to which there is substantial ground for difference of opinion.' These extraordinary writs are generally directed toward situations so bold and plain that the trial Judge's actions are examined in the light of the presence or lack of an abuse of discretion. Merely to decide a question of law incorrectly is certainly not an abuse of discretion." *Tokio Marine & Fire Insurance Co.* v. *Aetna Casualty & Surety Co.*, 322 F.2d 113, 115 (5th Cir. 1963).

The power to grant the peremptory writ of mandamus must be "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). A writ of mandamus is an especially inappropriate remedy for review of discovery orders within the discretion of the trial judge.*

In *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.*, 380 F.2d 277, 283 (2d Cir. 1967), peti-

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* See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940); *Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2nd Cir.), *stay denied*, 83 S.Ct. 964 (1963) (Harlan, J.); *Paramount Film Distributing Corp.* v. *Civic Center Theatre*, 333 F.2d 358 (10th Cir. 1964).

tioners sought a writ of mandamus to vacate a discovery order, alleging that the documents were protected by the work-product doctrine. The Court of Appeals denied the petition, holding that the decision of the trial court involved the "application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion. Whether the order below was correct or not . . . it involved no question of first impression."[7] The same reasons should have precluded the Seventh Circuit's interlocutory review of Judge Decker's discovery order.

The Seventh Circuit's opinion sought to justify the use of mandamus only by assertions that "maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy." Neither assertion offers a valid basis for interlocutory review of Judge Decker's discovery order by mandamus. Moreover, the record contains no evidence to support the assumption that disclosure of these debriefing statements, even if erroneous, would cause any injury that could not be remedied in the

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[7] The additional grounds cited by the opinion in *American Express* v. *Transamerica* for denying the writ of mandamus are particularly appropriate to this case:

> "Besides the obvious possibilities for abuse in the typical case if a court of appeals were to exercise intermittent supervisory power over discovery in the district courts, we feel that the nature of the present litigation presents another compelling reason for our discretionary refusal to entertain the petition. In a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys or judges." (380 F.2d at 284)

normal course of appellate review. The factual affidavits filed by defendants make no claim that production of the debriefing statements would reveal trial strategy, or that any of the debriefing statements contain personal, irrelevant, or otherwise confidential material. As Judge Decker specifically found, "The debriefing statements are essentially factual summaries of the witnesses' testimony" before the grand jury. (Appendix B, p. 15a) The defendants will be "injured" by disclosure of such debriefing statements only if their employees have been dishonest or disingenuous during depositions. This kind of injury provides no ground to invoke the extraordinary writ of mandamus.

Judge Decker framed his discovery order in reliance, *inter alia*, upon the decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) (Kirkpatrick, J.), which articulated the so-called "control group" test with respect to whether statements taken from employees who appeared before the grand jury were protected by the corporate attorney-client privilege.* The defendants aggrieved by the discovery ruling in *City of Philadelphia* v. *Westinghouse Electric Co.* sought to reverse Judge Kirkpatrick, but the Third Circuit denied their petition for writ of mandamus. *General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The reaffirmance of the control group test by many decisions since Judge Kirkpatrick's 1962 opinion makes mandamus even less appropriate now than when the corporate attorney-client privilege issue first confronted the Third Circuit.

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*After delineating the control group test, Judge Kirkpatrick ruled that production of a debriefing statement was "not forbidden by the attorney-client privilege." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 32 F.R.D. 350, 351 (E.D. Pa. 1962).

II. THE OPINION OF THE SEVENTH CIRCUIT AS TO THE SCOPE OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE IRRECONCILABLY CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT IN *NATTA v. HOGAN* AND DECISIONS OF DISTRICT COURTS IN THE SECOND, THIRD, AND NINTH CIRCUITS, AND CONTRADICTS RULE 43 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Seventh Circuit's ruling conflicts with all relevant federal decisions regarding the scope of the corporate attorney-client privilege. Judge Decker expressly followed the law set forth in *Natta* v. *Hogan*, 392 F. 2d 686, 692 (10th Cir. 1969), to determine the limits of the corporate attorney-client privilege:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power." (Appendix B, p. 17a)

The Seventh Circuit's rejection of this test as "inadequate" creates an irreconcilable conflict between the Circuits on this important issue of law.

Moreover, the Seventh Circuit's opinion conflicts with "the trend of recent decisions"* beginning with *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F. Supp. 483 (E.D. Pa. 1962).

Judge Kirkpatrick's control group test was approved and followed in *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963). With respect to the definition of what persons should "properly be considered within the 'control group' (the client) insofar as it concerns the application of the attorney-client privilege," the *Garrison* opinion reasoned:

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* Advisory Committee's Note, Preliminary Draft of *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Rule 5-03(a)(3)), p. 80.

"Though the members of the 'control group' would be considered to be agents of the corporation within the attorney-client privilege, there must be some limitation with respect to this group or communications from all employees of the company who a member of the 'control group' might designate to give confidential information for the purposes of obtaining legal advice, or to take a substantial part in certain decisions, would be privileged. This would vest authority in the 'control group' to determine those to whom the privilege would apply which could well extend it beyond the purpose for which it was adopted. 65 Yale L. J., 953 at 955 (1956)." (213 F. Supp. at 518)

This holding contradicts and refutes the Seventh Circuit's statement that the corporate attorney-client privilege should apply to a report which any employee makes to a corporate attorney "at the direction of his superiors, in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 4a)

In another electrical price-fixing conspiracy case, Judge Christensen, with the approval of Judge Sylvester Ryan, ruled that the corporate attorney-client privilege did not protect "a stenographically reported statement which had been given by the witness to counsel for his employer, C. H. Wheeler Company, in the presence of the president of the company, concerning the testimony theretofore given by this witness to the Grand Jury." *Atlantic City Electric Co.* v. *General Electric Co.*, 61 Civ. 4258 (S.D. N.Y., Dec. 4, 1962).

The Seventh Circuit's holding also ignores the decision in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947), that "the protective cloak of [the attorney-client] privilege does

not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." Just as in this case, the witnesses interviewed in *Hickman* v. *Taylor* were employees of the company represented by the attorneys. Moreover, those employees participated in the accident giving rise to that litigation.[10]

In a number of other federal cases following *Hickman* v. *Taylor*, trial courts have ruled that employee interviews by attorneys regarding the performance of the employee's duties are not privileged. *E.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D.N.Y. 1951); *Humphries* v. *Pennsylvania R.R. Co.*, 14 F.R.D. 177, 178 (N.D. Ohio 1953). These decisions are inconsistent with the Seventh Circuit's holding.

The Seventh Circuit's ruling also conflicts with the requirement of Rule 43(a) of the Federal Rules of Civil Procedure. That rule provides:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts

[10] The distinction suggested by the Seventh Circuit between "witnesses" and "participants" creates a wholly unworkable test to determine the proper limits of the attorney-client privilege. For instance, a number of grand-jury witnesses were employed by several different companies during the price-fixing conspiracy. The attorney-client privilege certainly should not protect what these witnesses told the lawyer for their current employer about testimony concerning their sales practices at other companies. A proper test would focus instead upon whether a confidential attorney-client relationship existed between the employee and the debriefer.

> of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Judge Decker heeded this command, following the uncontradicted line of federal decisions which define the limits of the corporate attorney-client privilege. Moreover, the rule of law applied by Judge Decker has been embodied in the Preliminary Draft of the *Proposed Rules of Evidence for the United States District Courts and Magistrates.* (Rule 5-03(a)(3)) (March, 1969). The Seventh Circuit's preference for the view of the law proposed in certain defense oriented bar journal articles is no basis for mandamus.

It has been held that a federal judge should apply the law of the forum state with respect to claims of attorney-client privilege.[11] On this basis too, the Seventh Circuit was wrong to disturb Judge Decker's discovery order, since the Illinois courts follow the "control group" test. *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E. 2d 802, 806. (1964); *Golminas* v. *Fred Teitelbaum Construction Co.*, 112 Ill. App. 2d 445, 251 N.E. 2d 314 (1969).[12]

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[11] *E.g., Baird* v. *Koerner*, 279 F. 2d 623, 628 (9th Cir. 1961); *Giordani* v. *Hoffman*, 278 F. Supp. 886, 889 (E.D. Pa. 1968).

[12] The only judicial authority cited by the Seventh Circuit in support of its ruling was dictum in an opinion denying mandamus by a state court in another jurisdiction. *D. I. Chadbourne* v. *Superior Court*, 388 P. 2d 700 (Calif. 1964). Such dictum affords no basis for overturning the decision rendered by Judge Decker in accordance with applicable federal and state law.

III. THE SEVENTH CIRCUIT HAS ADOPTED AN AMBIGUOUS AND UNWORKABLE RULE OF LAW WHICH WOULD SERIOUSLY HINDER PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS AND CREATE CONFUSION WITH RESPECT TO THE ADMINISTRATION OF JUSTICE IN THE FEDERAL SYSTEM

It has been frequently stressed by this Court "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 568 (1951).

Due to the inevitable time lapse between a price-fixing conspiracy and the damage trial, access to debriefing statements, such as involved in this case, becomes especially meaningful. Price-fixing conspiracies are often concealed successfully for many years until they disintegrate. Because of the self-concealing nature of the conspiratorial acts, the victims generally do not learn of them until the federal government, equipped with superior means of investigation, has brought charges. For both legal and practical reasons, private damage actions usually do not progress to the discovery stage until the government action is completed or settled. Thus, the discovery aspect of private damage litigation may not occur until three to five years after the conspiracy has been unmasked, and more years after the crucial events and conversations that were the inception of the illegal scheme. If, as frequently occurs, the federal action is settled by a *nolo contendere* plea or consent judgment, damage plaintiffs must themselves prove the violation. In that effort, the great obstacle is the conspirators' lack of memory—real or feigned. Accordingly, there is a great need for materials that will refresh recollection or reveal that stories have altered with the passage of time. In this litigation,

for instance, the debriefing statements record interviews in 1966, whereas depositions were not conducted until 1969.

As the District Court concluded, the debriefing statements may refresh deposition recollection and disclose relevant aspects of the price-fixing conspiracy not probed by the grand jury. Moreover, the few debriefing statements already obtained by plaintiffs in this case show that witnesses concealed valuable information in both grand jury and deposition testimony.[13]

The debriefing statements are valuable to plaintiffs as clues to whether a deponent or trial witness has been evasive or dishonest. Since corporations have no privilege against self-incrimination, corporate counsel cannot prevent their employees from being deposed or called as witnesses.[14] Thus, they cannot prevent revelation that the company has defrauded or injured its customers. If the debriefing statement is identical to a deponent's testimony, it reveals no secrets to plaintiffs. Therefore, keeping debriefing statements secret would not safeguard client con-

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[13] For example, Clarence N. Roland who was sales manager at different times for three separate defendants, Childrens Press, Golden Press and Follett, had his deposition taken. Pursuant to Judge Decker's order, Childrens Press submitted Roland's debriefing memorandum to plaintiffs. This memorandum revealed sharp factual contradictions with the deposition testimony and revealed further that the witness had consciously withheld information from the grand jury itself. The following statement in the memorandum is illustrative:

> "Roland told the debriefers but not the grand jury that occasionally he did purposely 'lose' orders from discounting jobbers." (p. 5)

The expression that publishers "did purposely 'lose' orders from discounting jobbers" described a device used by publisher defendants to coerce jobbers into maintaining the fixed net prices as charged in the complaints.

[14] *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906); *Wilson* v. *United States*, 221 U.S. 361 (1911).

fidences but only conceal the fact that an employee has lied or prevaricated during a deposition.

The problems in this area were considered by the distinguished committee preparing the rules of evidence for use in all federal district courts. Their preliminary draft sets forth the general rule of privilege as follows:

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications (1) between himself or his representatives and his lawyer or his lawyer's representatives." (Rule 5-03(b))

A "representative of the client" is defined as

> "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Prelimnary Draft of *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Rule 5-03(a)(3))

Moreover, the Advisory Committee's Note cites with approval *City of Philadelphia* v. *Westinghouse Electric Co.* and *Natta* v. *Hogan,* the cases which the Seventh Circuit seeks to repudiate. (pp. 80-81)

The Seventh Circuit's opinion cites the *Proposed Rules of Evidence,* but ignores its recommendation. It cites ample federal precedent for the "control group" test followed by the District Court, but then issues a writ to prevent the District Court from enforcing its order based on this rule of law.

The issuance of the writ of mandamus under these circumstances was unjustified. The rule fashioned by the Seventh Circuit would hamper private enforcement of the antitrust laws and would create uncertainty and confusion in the administration of the rules of discovery in the fed-

eral courts. It is essential for this Court to resolve this important issue.

CONCLUSION

For the reasons set out above, this Court should grant certiorari to resolve the conflict between the decision of the Seventh Circuit and those of the Tenth and Third Circuit Courts of Appeals, to establish rules defining the proper scope of the corporate attorney-client privilege, and to reestablish limits on the use of mandamus to avoid the "final judgment" rule and 28 U.S.C. § 1292(b).

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969 — JANUARY SESSION, 1970

No. 18008

HARPER & ROW PUBLISHERS, INC., *et al.*,

Petitioners,

v.

HONORABLE BERNARD M. DECKER, United States District Judge,

Respondent.

Petition for Writ of Mandamus

February 4, 1970

Before KILEY, FAIRCHILD and CUMMINGS, *Circuit Judges*.

PER CURIAM. In more than forty separate antitrust actions brought in eight judicial districts, plaintiffs, state and local governments, public schools, and public libraries, sought damages from twenty-three defendants (petitioners here), publishers and wholesalers, for alleged conspiracies to inflate the prices for children's editions of library books. Pursuant to 28 U.S.C. §1407 these actions were transferred for consolidated discovery and pretrial proceedings to the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Bernard M. Decker, presiding. Petitioners seek mandamus to compel the district judge to vacate an order dated October 17, 1969 insofar as it permitted plaintiffs

to inspect and copy certain memoranda, all but one of which were prepared by attorneys while "debriefing" a number of persons (each an employee or former employee of one of petitioners) shortly after each had testified before a federal grand jury investigating various aspects of the publishing industry.

Plaintiffs sought production of these memoranda under Rule 34, F.R.C.P. Petitioners countered with the claim that the debriefing memoranda were protected by the attorney-client privilege or as attorneys' work product. The judge ordered petitioners to submit the memoranda under seal, and to file a precise factual statement setting forth the circumstances of the preparation of each.

The judge did not examine the memoranda. In every instance but two, he decided that neither an attorney-client privilege nor any status as work product excused discovery.

The judge refused to make a certification under 28 U.S.C. §1292(b), for the purpose of appeal. Petitioners sought mandamus, and because an appeal, ultimately, from the final decision would be an inadequate remedy, we ordered an answer and briefs.

The claims made by petitioners fall under the following topics: (1) Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged. (2) Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged. (3) Whether the memoranda were protected work product of the attorney. (4) Whether good cause was shown for discovery of work product.

(1) *Whether the relationship between the person interviewed and the attorney was such as to make the communication privileged.*

The judge had before him assertions on this point in affidavits and depositions. In at least three instances

(Davidson, Rose and Rowe), there was a difference between the statement of the attorney and of the person interviewed which raised a degree of ambiguity. There was at least one assertion of the existence of a personal attorney-client relationship with respect to Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Stokes, Street, Davidson, Rose, Rowe, Callaway, and witnesses "A" and "B" of Golden Press.

The judge decided that there was no personal attorney-client relationship in these instances because it failed to appear that the attorney did (1) render personal legal advice to the witnesses, (2) advise them on personal matters, or (3) bill them for services. He concluded that the witnesses talked to the attorneys as a favor to the respective corporations.[1]

Petitioners can not assert the privilege of the individuals, if such privilege existed. The attorneys could presumably assert their obligation to the individuals, although the attorneys are before this court only as counsel for petitioners.

In any event we do not find the existence of personal attorney-client relationships so clearly established that mandamus is appropriate to compel the district court to recognize the privilege which would arise therefrom.

(2) *Whether the relationship between the person interviewed and the attorney's corporate client was such as to make the communication privileged.*

Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of petitioners at the time of interview, but were interviewed by counsel for another petitioner. Neither group need be considered under this topic.

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[1] The Bonsal memorandum is not involved in this proceeding. The judge found a personal attorney-client relationship and held the memorandum privileged.

Messrs. Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker were employees of the corporate client at the time of the interview. It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was germane to the duties of his employment. On the other hand, although some of these employees had supervisory or even policy making responsibilities with respect to the branch of the corporate business with which they worked, it was not demonstrated that any of these employees was in a position to control or take a substantial part in a decision about action which the corporation may take upon the advice of the attorney, nor that he was a member of a group having that authority.[2]

The district judge substantially followed the "control group" test of the relationship between corporate client and persons making the communication to the attorney which must exist if the communication is to be protected by the corporation's attorney-client privilege. This test was formulated by Judge Kirkpatrick in *City of Philadelphia* v. *Westinghouse Electric Corp.* (E.D. Pa., 1962) 210 FSupp. 483. A similar test appears in Rule 5-03(a)(3), Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, March, 1969.

If the control group test be wholly adequate, it has not been shown that the district judge erred in his application of it.

Judge Kirkpatrick's control group test has been applied by other courts. *E.g., Natta* v. *Hogan* (10th Cir., 1969), 392 F2d.686, 692; *Garrison* v. *General Motors Corp.* (S.D.

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[2] The Bonsal and Milne memoranda are not involved in the present proceeding. The judge found that Bonsal and Milne were members of the control group of their employer, and held their communications privileged.

Cal., 1963), 213 FSupp. 515. It has been criticized. Burnham, Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois, 56 Ill. B.J. 542, 545-48 (1968); Heininger, The Attorney-Client Privilege as it Relates to Corporations, 53 Ill. B.J. 376, 384 (1965). Broader tests have been suggested. See Pye, Fundamentals of the Attorney-Client Privilege, 15 Prac. Law. 15, 19 (Nov. 1969); Maurer, Privileged Communication and the Corporate Counsel, 28 Ala. Law. 352, 375 (1967); *D. I. Chadbourne, Inc.* v. *Superior Court* (1964), 36 Cal. Rptr. 468, 388 P2d 700, 709.

We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.

It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.

We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate.

(3) *Whether the memoranda were protected work product of the attorney.*

We think that the district judge incorrectly suggested that some of the memoranda did not qualify as work product because "the lawyers functioned primarily as investigators." Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator. See *Hauger* v. *Chicago, Rock Island, and Pacific R. Co.* (7th Cir., 1954), 216 F2d 501; *United States* v. *American Optical Co.*, 37 F.R.D. 233, 238 (E.D. Wis., 1965); *United States* v. *Aluminum Co. of America*, 34 F.R.D. 241, 242-3 (E.D. Mo., 1963). Indeed, the qualified privilege might even attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself. *Alltmont* v. *United States* (3rd Cir., 1950), 177 F2d 971, cert. den. 339 U.S. 967 (1950). Of course, the less the lawyer's "mental processes" are involved, the less will be the burden to show good cause. *United States* v. *Swift & Co.* (N.D. Ill., 1959), 24 F.R.D. 280, 284.

(4) *Whether good cause was shown for discovery of work product.*

The judge made specific findings of good cause for permitting plaintiffs to examine the grand jury testimony of nine of the person who were later interviewed by the attorneys. Three of them are not involved in the present proceeding. The debriefing memoranda of five of them, Callaway, Dyckman, Hood, Sciosia and Thompson, we have held protected by the attorney-client privilege of their employers. Rust is the one remaining. The judge found, from comparison of his deposition with his grand jury testimony, that there were material discrepancies and failures to recall significant facts. It seems clear that, insofar as the character of this memorandum as work product remains relevant, good cause was properly found.

We are unable to determine whether the district judge inspected any depositions other than those taken from the above mentioned nine. As to the remaining memoranda, the determination of good cause seems to rest generally on a finding that a six year lapse of time would inevitably cause memories to dull coupled with findings apparently based on conclusions regarding the deficiencies of the nine depositions examined. In these instances more specific findings as to each individual would have been better. See *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.* (7th Cir., 1954), 216 F2d 501, 505. We conclude, however, that lack of good cause has not been made to appear sufficiently for issuance of a writ of mandamus. Thus the order under attack will stand as to all debriefing memoranda except in those instances where we have determined in part (2) above that the corporation's attorney-client privilege protects from discovery.

A writ of mandamus will issue compelling respondent district judge to exempt from his order of October 17, 1969, the debriefing statements of the following: Moorman, Hood, Thompson, Sciosia, Patella, Guerney, Heidelberger, Rowe (as to Thomas Y. Crowell Company), Stokes, Davidson, Callaway, Witness A of Golden Press, Walker, Dyckman, Mitchell, Andrus, and Hoocker, and to order the return of each of those debriefing statements to the defendant which produced it. In all other respects the petition for mandamus is denied. Petitioners are to submit a proposed writ following the procedure prescribed by Rule 19 F.R.A.P. for settlement of judgments enforcing orders of agencies.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

STATE OF ILLINOIS, Plaintiff, -vs- HARPER & ROW PUBLISHERS, INC., et al., Defendants. AND RELATED CASES.	No. 67 C 1899

MEMORANDUM OPINION

Pursuant to 28 U.S.C. § 1407, more than forty separate antitrust actions have been transferred to this court for consolidated discovery and pretrial proceedings. Originally instituted in eight judicial districts, the private treble damage suits seek compensation from publishers and wholesalers for alleged conspiracies which inflated the prices for children's editions of library books. The plaintiffs are state and local governments, public schools, and public libraries.

In an ambitious discovery program, the parties have deposed approximately one hundred witnesses during the last four months. Since many of the central events occurred six to ten years ago, the deponents' memories are often incomplete. Some witnesses have been deliberately evasive. Other deponents have forgotten major incidents involving the alleged price fixing and cannot remember receiving incriminating correspondence. Deposition testimony sometimes conflicts with documentary evidence

which the witnesses personally prepared several years ago. The plaintiffs therefore seek to inspect the grand jury transcripts of eleven witnesses who testified about three years ago.[1] In addition, the public schools and libraries ask that the publisher and wholesaler defendants produce all debriefing memoranda that summarize the deponents' grand jury testimony.

After discussing whether the grand jury transcripts should be released, this opinion will outline the procedure which will govern the disposition of additional requests for the disclosure of transcripts. Then, the defendants' two objections to revealing their debriefing documents, the attorney-client privilege and the work product doctrine, will be analyzed.

I. GRAND JURY TRANSCRIPTS.

Rule 6(e) of the Federal Rules of Criminal Procedure declares that:

> "[Persons] may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding . . . No obligation of secrecy may be imposed upon any person except in accordance with this rule."

The disclosure of grand jury minutes is committed to the sound discretion of the trial judge. *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395, 399 (1959). In cases of particularized need, the long established policy of grand jury secrecy is lifted discretely and limitedly. To illustrate, in *United States* v. *Procter & Gamble,* 356 U.S. 677, 683 (1958), the Supreme Court explained that "the use of the grand jury transcript at the trial to impeach

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[1] In 1966 the federal government convened a criminal grand jury to investigate the pricing of library editions of children's books. Although nearly ninety witnesses testified, the United States decided not to seek indictments.

a witness, to refresh his recollection, to test his credibility and the like" constitute particularized need.[2] See *Dennis* v. *United States*, 384 U.S. 855, 873-874 (1966).

A. *In Camera Inspection*

Plaintiffs want to examine the transcripts of John Callway, Joseph Christie, Francis H. Dyckman, Jr., S. Gordon Ferguson, Alan C. Hood, Thomas Maher, Paul D. Rust, Frank Scioscia and James L. Thompson.[3] The publishers and wholesalers maintain that the transcripts are sought purely for discovery purposes. But the vast majority of the witnesses are beyond the subpoena power of the forum court. The depositions are therefore evidentiary. The use of grand jury minutes to refresh the deponents' recollection or to impeach their statements is equivalent to their use at trial.

During the depositions, each witness demonstrated a remarkable lack of memory concerning critical events in controversy. This court's *in camera* inspection of the witnesses' grand jury transcripts reveals that each witness' recall was substantially more extensive in 1966. In each instance, there exist material discrepancies on important factual issues or significant facts that the witness failed to recollect. *Compare Atlantic City Electric Co.* v. *A.B. Chance Co.*, 313 F.2d 431, 434 (2nd Cir. 1963); *Con-*

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[2] *Compare United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940):

> "[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."

[3] Two additional grand jury witnesses, James F. Heidelberger and William J. Hoocker, are either deceased or too sick to be deposed. Other than a declaration of relevancy, plaintiffs have advanced no showing of particularized need. Moreover, the testimony recorded in the transcripts of Heidelberger and Hoocker would be inadmissible at trial. Accordingly, these transcripts will not be released.

solidated Edison Co. of N.Y. v. *Allis-Chalmers Mfg. Co.*, 217 F.Supp. 36, 38 (S.D. N.Y. 1963). Furthermore, as Judge Boldt stated in *In re Sellers*, 32 F.R.D. 473, 477 (N.D. Ill. 1962):

> "[T]he likelihood that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings."

In the interest of justice, there is a compelling need for the disclosure of the requested minutes.

The most relevant parts of the transcripts are interwoven with the remainder of the witnesses' testimony, so that various portions should not be segregated from one another. The entire transcripts will be released since they contain no extraneous matter. Neither the votes nor the deliberations of the grand jurors appear in the minutes.

The following protective order will guard the integrity of all released minutes:

> "The transcript is provided solely for the personal perusal of counsel and shall be used only for such further interrogation of deponents as may be authorized. No part of the transcript shall be copied or reproduced, and the entire transcript shall be returned to this court when its use has been completed."

See *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233, 237 (5th Cir. 1963).

B. Additional Transcripts.

Since the public schools and libraries will undoubtedly seek to inspect additional grand jury minutes, the procedure governing their release may appropriately be discussed at this time.[4]

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[4] The conclusions reached in this section also provide an alternative ground for releasing the nine transcripts considered in part *I.A. supra.*

Five policy reasons have traditionally been advanced for imposing secrecy upon grand juries.[5] The only relevant justification for secrecy here is encouraging free future disclosure by individuals with information about antitrust violations. See *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 490 (E.D. Pa. 1962). In particular, since potential witnesses are normally employees, customers or suppliers of the offenders, the witnesses might suffer retaliation if their testimony became public. On the other hand, *Dennis* v. *United States*, 384 U.S. 855 (1966), significantly eroded the principle of grand jury secrecy when its main justification is encouraging the subsequent disclosure of crimes. In criminal prosecutions, the witnesses' grand jury minutes must be furnished directly to the defendant once particularized need is established, thus publicizing the earlier testimony.

Moreover, the Supreme Court indicated that a showing of particularized need varies depending upon the impor-

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[5] See *United States* v. *Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954):

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

See also *United States* v. *Procter & Gamble*, 356 U.S. 677, 681 n.6 (1958).

tance of maintaining secrecy in each individual situation.[6] When a treble damage suit is tried, grand jury witnesses are usually called to testify. Their earlier disclosure may then become public knowledge, thus exposing them to potential retaliation. Release of the grand jury minutes during discovery merely advances the same dangers created at trial.[7] In his dissent to *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 406 (1959), Mr. Justice Brennan explicated that:

> "Disclosure of his testimony before the grand jury is hardly likely to result in any embarrassment that his trial testimony has not already produced. 'If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm . . . which his testimony on the open trial does not equally tend to produce.' 8 Wigmore, Evidence (3d ed. 1940), § 2362, at 725."

Furthermore, relatively little secrecy surrounds the 1966 children's books grand jury. The defendants' attorneys con-

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[6] "Certainly in the context of the present case, where the Government concedes that the importance of preserving the secrecy of the grand jury minutes is minimal and also admits the persuasiveness of the arguments advanced in favor of disclosure, it cannot fairly be said that the defense has failed to make out a 'particularized need.'" 384 U.S. 871-872.

[7] After reviewing the judiciary's increasing willingness to release grand jury minutes, Mr. Justice Fortas recently declared that:

> "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." 384 U.S. at 870.

Dennis v. *United States*, 384 U.S. 855, 870 (1966). While the Supreme Court has not yet authorized automatic disclosure in treble damage actions, the scope of discovery is normally wider in civil litigation than in criminal prosecutions.

tacted numerous witnesses immediately after their appearance and recorded the substance of the witnesses' testimony in debriefing memoranda.[8] After preparing their own testimony summaries, other witnesses circulated their debriefing statements to their corporate superiors. The publishers' and wholesalers' reliance upon the principle of grand jury secrecy is designed to conceal from the public schools and libraries relevant information which the defendants have already assembled.

During the nine depositions discussed in part *I.A. supra*, the witnesses were repeatedly unable to recall significant facts. What recollection they could muster was often so vague as to be of only limited value. Their testimony sometimes conflicted with documentary evidence, including correspondence to and from the witnesses themselves. Since the importance of preserving the instant grand jury minutes is minimal, *in camera* analyses will not be conducted in the future if the public schools and libraries demonstrate similar recalcitrance and unexplained failures to remember.[9] Such a showing will constitute particularized

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[8] One law firm interviewed at least ten witnesses, including several employees of unrelated companies.

[9] In a related context, Chief Judge Pence explained that:

> "It is now well settled that disclosure rather than suppression of relevant materials in grand jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting disclosure of relevant testimony therein."

State of Washington v. American Pipe & Const. Co., 41 F.R.D. 59, 63-64 (S.D. Cal. 1966).

need justifying the release of the witnesses' grand jury transcripts.[10]

II. DEBRIEFING MEMORANDA.

Plaintiffs' examination of additional grand jury minutes will require that a witness first be deposed. As a more complete aid to discovery, the public schools and libraries therefore seek to inspect the debriefing memoranda which were prepared soon after the witnesses testified before the grand jury. The debriefing statements are essentially factual summaries of the witnesses' testimony.[11] The documents may substantially refresh future deposition recollection, thereby rendering extensive transcript requests unnecessary. Furthermore, the debriefing statements may discuss relevant aspects of the alleged price fixing conspiracy which

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[10] Having invaded the grand jury secrecy by their debriefing of the witnesses, the defendants have advanced no compelling policy justification for withholding the transcripts from the plaintiffs. Therefore, the public schools and libraries may be entitled to examine the minutes prior to deposing the witnesses. Rather than releasing the minutes in a wholesale fashion, the court might disclose only the transcripts of those witnesses whom the plaintiffs actually expect to question. But, the broad holding of *United States* v. *Procter & Gamble*, 356 U.S. 677, 683 (1958), suggests that such a decision could be appropriate for certification under 28 U.S.C. § 1292(b), thus completely halting discovery for many months. At this stage of the litigation, an early release of the minutes does not warrant the substantial delay which might ensue.

[11] The memoranda were filed with this court in sealed envelopes, accompanied by a precise factual statement specifying how the documents were prepared.

In their briefs, several defendants object strenuously to any unsealing of the envelopes, including *in camera* inspection. The envelopes therefore remain unopened. But as a consequence, ambiguities and omissions in defendants' factual statements have necessarily been construed against them.

were not probed by the grand jury, thus supplementing the minutes which will be released today.[12]

When the debriefing documents were prepared, counsel often assisted witnesses in their recollection.[13] Defendants therefore resist production under F.R.C.P. 34, maintaining that the documents are insulated by the attorney-client privilege and by the work product doctrine.

A. *Attorney-Client Privilege.*

Communications from a client to a lawyer may be immune from discovery. See, *e.g., Radiant Burners, Inc.* v. *American Gas Ass'n.*, 320 F.2d 314, 324 (7th Cir. 1963).[14] Either of two varieties of the attorney-client privilege can exist. First, when the debriefing statements were prepared, counsel and the witnesses may have had a personal attorney-client relationship. While numerous defendants claim such immunity, they failed to present any factual support for their assertions. With one exception,[15] the attorneys did not (1) render personal legal advice after the witnesses completed their grand jury testimony, (2)

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[12] For example, in order to clarify the scope of the grand jury's inquiry, a witness may have specified that there were no questions concerning various enumerated incidents of dubious legality. Such a debriefing statement could be valuable to refresh a witness' recollection or to impeach deposition statements.

[13] The memorandum may have been designed to circumvent the secrecy surrounding grand juries. By aggregating the statements from most subpoenaed witnesses, antitrust defendants might determine what evidence was presented to the grand jury.

[14] The Seventh Circuit held that the attorney-client privilege protects "confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby."

[15] Prior to Bonsal's grand jury appearance, his lawyers prepared wills for the family, thus establishing a personal attorney-client relationship. Bonsal's debriefing memorandum will be returned unopened.

advise them on other personal matters, or (3) bill the witnesses for their services. Since the lawyers' respective law firms were counsel for the witnesses' employers, the debriefing consultations were apparently conducted as a favor to the corporations. The documents are thus not protected by a personal attorney-client privilege.

Second, a corporate attorney-client privilege could have existed. See, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 89 F.Supp. 357, 359-360 (D. Mass. 1950); *Radio Corp. of America* v. *Rauland Corp.*, 18 F.R.D. 440, 443 (N.D. Ill. 1955). But only communications from certain employees to the company's attorney create that relationship. Specifically, a responsible member of the corporation's management or control group must seek legal advice about corporate affairs. See, *e.g.*, *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483, 485 (E.D. Pa. 1962).[16] Moreover, the corporate official must be in a position to influence the decision about which legal counsel is sought. In *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968), the Tenth Circuit stated that:

> "[T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power."

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[16] "[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, of if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice."

See also *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal. 1963).[17]

In the instant cases, the debriefing memoranda were created to assist the publishers and wholesalers in defending the actions instituted by the federal government and private treble damage plaintiffs. Only Bonsal and Milne were in a position to influence their company's litigation strategy in these lawsuits.[18] While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases. Accordingly, the debriefing documents are not protected by a corporate attorney-client privilege.

B. *Work Product Doctrine.*

The work product doctrine protects counsel's legal strategies and thought processes from discovery by an adversary. *Hickman* v. *Taylor*, 329 U.S. 495, 509 (1947). The principle does not, however, insulate non-legal services rendered by persons who happen to be attorneys.

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[17] Defendants rely heavily upon *Continental Oil Company* v. *United States*, 330 F.2d 347, 349 (9th Cir. 1964). In an abbreviated opinion, the Ninth Circuit concluded that personal and corporate attorney-client relationships existed. The Court did not analyze which corporate officials' consultations create the privilege.

[18] These individuals' memoranda will be returned in the sealed envelopes.

Mr. Milne "participated in—and in some instances controlled—the decisions which William Morrow and Company made in connection with the corporate conduct which forms the basis of these actions."

The statements may be divided into two categories.[19] In the first group, the lawyers functioned primarily as investigators. By asking questions and recording the answers, they attempted to reconstruct the witnesses' grand jury testimony. Such periphal participation by a lawyer does not convert a factual summary into his work product. In *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 46-47 (S.D. N.Y. 1951), Judge Weinfield expounded that:

> "The rationale underlying. . .[*Hickman* v. *Taylor*] was intended to apply only when [an attorney] acts in his true professional capacity.
>
> "It is a fair inference that the procurement of the statements . . . was not the result of any basic professional relationship between the lawyer . . . . and the defendant, or that it required the training, skill and knowledge of a lawyer or the essential integrity implicit in the lawyer-client relationship. The services were those normally rendered by an investigator or claim agent . . ."

See *Diamond* v. *Mohawk Rubber Co.*, 33 F.R.D. 264, 267 (D. Colo. 1963).

Second, certain statements, such as those of Hoocker and Rowe, contain counsel's "recollections, observations, comments and impressions about [the witness'] report of his appearance before the grand jury." Assuming *arguendo* that these nebulous additions constitute work product, these documents are only entitled to limited pro-

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[19] According to Golden Press, Inc., its document B-1 "is not a debriefing memoranda. . .

> "The document consists primarily of statements by counsel. Only a very small portion of the memoranda concerns statements made by the witness during the course of his examination by the grand jury."

The statement will therefore be returned to the defendant.

tection since they remain basically summaries of testimony.[20]

Under F.R.C.P. 34, work product materials may properly be examined by the opposing party if there exists good cause or special circumstances which justify invading the attorney's thought processes. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 207 F.Supp. 407, 410-411 (M.D. Pa. 1962).[21] In determining whether good cause has been established, the harm caused by revealing lawyers' work product is compared with the need for discov-

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[20] Counsel have not indicated that their professional abilities were utilized; presumably, the documents do not include legal analysis nor do they discuss litigation strategy.

If the mere physical involvement of an attorney converted documents into work product, parties could easily insulate damaging evidence from an adversary. Alternative discovery procedures, such as depositions and the production of related materials, might be less revealing than the documents clothed with immunity.

[21] Contrast *Allmont* v. *United States*, 177 F.2d 971, 978 (3rd Cir. 1950), and *Hauger* v. *Chicago, Rock Island & Pacific Railroad Co.*, 216 F.2d 501, 507 (7th Cir. 1954), in which the moving parties failed to make the requisite showing of good cause. Nevertheless, the Seventh Circuit explained that:

> "The presence of special circumstances might, of course, constitute good cause for the entry of an order to produce such statements for examination." 216 F.2d 507.

Judge Robson denied discovery of work product statements in *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F.Supp. 736, 741 (N.D. Ill. 1962), because:

> "Plaintiffs in their brief admit that no showing of good cause along traditional lines has been presented. They argue that the unique character of this litigation is of itself a sufficient showing of good cause for production."

ery. In *United States* v. *Swift & Co.*, 24 F.R.D. 280, 284 (N.D. Ill. 1959), Judge Hoffman thus declared that:

> "The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened."

The instant antitrust cases are unusual because the alleged price fixing conspiracy was particularly active six to ten years ago. Although the plaintiffs have voluminous documents available for examination and have deposed a large number of witnesses, the intervening years continue to obscure many crucial factual questions. The witnesses have long since forgotten the details of their operations; frequently, they cannot even remember major incidents in which deviations from "net" prices were punished. Quite regularly, witnesses confronted with copies of their own letters have little or no recall. Similarly, deponents often do not remember receiving incriminating correspondence, nor do they offer reasonable explanations for apparent admissions that their prices were illegally inflated. If the conspiracy existed, plaintiffs' inability to prepare fully for trial results from the publishers and wholesalers' concealment of the price fixing. As public bodies, the plaintiff schools and libraries are charged with a responsibility to protect the taxpayers' finances.

When compared to the defendants' minimal work product claims, the plaintiffs' need for discovery establishes good cause under F.R.C.P. 34. Plaintiffs have demonstrated special circumstances which justify the disclosure of counsel's comments and notations that were interspersed among the factual summaries of grand jury testimony. See, *e.g.*, *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 47 (S.D. N.Y. 1951); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Dela. 1954); *Sharon Steel Corp.* v. *Travelers Indemnity Co.*, 26 F.R.D. 113, 115 (N.D. Ohio 1960). Accordingly, except for the Bonsal and Milne documents, all debriefing memo-

randa may be examined by the plaintiffs. The statements will not be returned to the defendants at this time.

III. CONCLUSION.

Nine of the requested grand jury transcripts will be released since the plaintiffs have demonstrated particularized need. The importance of maintaining secrecy is minimal in these consolidated cases. In the future, grand jury minutes will be released without an *in camera* inspection if plaintiffs establish that the deponents have a glaring failure of memory or that their testimony contradicts reliable documentary evidence.

With respect to the debriefing documents, only the Bonsal memorandum is privileged because of a personal attorney-client relationship. Similarly, the corporate attorney-client privilege protects only the Bonsal and Milne documents. The other witnesses were not members of the corporation's control group. Finally, none of the documents is immunized by the work product doctrine since counsel's peripheral participation is outweighed by the compelling need for discovery in these actions.

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: October 7, 1969.